In The

Supreme Court of the United States

October Term, 1976

No. 76-923

LYNN JORDAN AND GERALD HYLAND,
Appellants,

v.

MILLS E. GODWIN, JR., GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY AFFIRMANCE

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Pursuant to Rule 16(a) of this Court, the appeal should be dismissed since it was not taken within the time period set forth in 28 U.S.C. § 2101(b).

Alternatively, the judgment of the three-judge court should be summarily affirmed pursuant to Rule 16(c) of this Court on the ground that the question on which the appeal depends is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the District Court denying summary judgment for plaintiffs (appellants) and finding for defendant on the merits is set forth in the Appendix to Appellants' Jurisdictional Statement (hereinafter "App.").

JURISDICTION

The Court's jurisdiction has not been established. A three-judge court was convened pursuant to 28 U.S.C. § 2281. Judgment, with an opinion on the merits, in favor of appellees was entered on September 8, 1976. Pursuant to 28 U.S.C. § 2101(b) appellants had until November 8, 1976 (sixty days from entry of the judgment), to note their appeal. A notice of appeal was not filed until December 3, 1976.

STATUTE INVOLVED

The statute challenged by appellants is § 54-375, *Va. Code* (Repl. Vol. 1974) which is set forth in Appellants' Brief at 3.

QUESTION PRESENTED

The question presented is:

Do appellants, who are not licensed optometrists, have a First or Fourteenth Amendment right to appointment to a State Board of Optometry, which is limited by State statute to optometrists who are duly licensed State residents and have been engaged in optometry for at least five years prior to appointment?

STATEMENT OF THE CASE

The relevant facts and statement of the case are set forth in the District Court's opinion. App. 1a-12a.

ARGUMENT

I.

The Appeal Should Be Dismissed For Failure To File A Notice Of Appeal Within Sixty Days As Provided By 28 U.S.C. § 2101(b).

Jurisdiction of this Court has not been established. On September 8, 1976, the three-judge court entered an order, with an accompanying opinion, denying plaintiffs' motion for summary judgment and finding for defendants on the merits. On December 1, 1976, appellants requested leave of the District Court to file a notice of appeal after the running of the sixty-day period provided in 28 U.S.C. § 2101(b). Leave to file the appeal was improperly granted. App. 13a.

The District Court has no power to waive the statutory period in which a notice of appeal must be filed. A direct appeal to this Court from a final decision rendered by a three-judge court under 28 U.S.C. § 1253 must be taken within sixty days. 28 U.S.C. § 2101(b). *Cf.* Rule 4(a), Federal Rules of Appellate Procedure, which provides that the notice of appeal shall be filed within thirty days from the date of entry of a final order and that an additional thirty days may be permitted for "excusable neglect"; the maximum possible period for a notice of appeal being sixty days.

Section 2101 does not permit the untimely filing of appeals. Accordingly, the District Court erroneously granted leave to file the notice of appeal, and the appeal should be dismissed.

II.

The District Court's Order Should Be Summarily Affirmed Since No Substantial Question Requiring Additional Argument Is Necessary.

Judge Warriner for the District Court accurately summarized this case by declaring:

> "The Court is not aware of and plaintiffs do not cite any authority for, the proposition that there is a First Amendment right to be considered for appointment to a public office. Such a right is so fleeting and ephemeral as to be, as a practical matter, unenforceable." App. at 10a.

Turner v. *Fouche,* 396 U.S. 346 (1970), upon which appellants heavily rely in their Jurisdictional Statement, is inapposite to this appeal. Appellants fail to distinguish cases involving suspect classes and invidious discrimination, such as *Turner* v. *Fouche, supra* from the instant case. *Turner* involved a classic case of freehold requirements being used to discriminate against Black participation on a School Board.

Appellants are not, however, members of a suspect class nor are fundamental rights involved. While there may be a right to run for public office which requires strict scrutiny, *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), there is no fundamental right to be appointed to public office.

Where neither a suspect class nor a fundamental right is involved, the proper test for the constitutionality of a state statute is whether the statutory requirement is rationally related to a legitimate legislative objective. *Weinberger* v. *Salfi,* 422 U.S. 749 (1975). The District Court properly applied that test in this case.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed; alternatively, the Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion to Dismiss, Or Alternatively, Motion for Summary Affirmance were mailed, postage prepaid, to Peter H. Schuck, Esquire, 1714 Massachusetts Avenue, N.W., Washington, D. C. 20036, this 26th day of January, 1977.

JOHN HARDIN YOUNG
Assistant Attorney General